Investigation by the Department of Telecommunications and Energy on its own motion, pursuant to G.L. c. 164, §§ 1E, 76 and 93, into Massachusetts Electric Company's and Nantucket Electric Company's service quality filings, including but not limited to, their service quality filings submitted in response to Service Quality Standards for Electric Distribution Companies and Local Gas Distribution Companies, D.T.E. 99-84.

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#### I. <u>INTRODUCTION</u>

On September 7, 2001, the Department of Telecommunications and Energy ("Department") opened an investigation into the quality of electric service provided by the Massachusetts electric distribution companies pursuant to G.L. c. 164, §§ 1E, 76, 93¹ and G.L. c. 30A, §§ 10, 11. Investigation into Quality of Electric Service, D.T.E. 01-71 (2001). The Department stated that the investigation would include, but would not be limited to, the service quality plans filed by the electric distribution companies pursuant to the Order issued on June 29, 2001 in Service Quality Standards for Electric Distribution Companies and Local Gas Distribution Companies, D.T.E. 99-84 (2001). D.T.E. 01-71, at 1. In addition, the Department stated that it would consider its directives to Massachusetts Electric Company and Nantucket Electric Company (together, "MECo" or the "Company") in Massachusetts Electric Company/Eastern Edison Company, D.T.E. 99-47, at 30-32 (2000), as a basis for applying service quality penalties for the period between its merger/acquisition consummation and the start of penalties established pursuant to D.T.E. 99-84. Id.

By Procedural Order dated December 7, 2001, the company-specific investigation into MECo's service quality was docketed as D.T.E. 01-71B.<sup>2</sup> The Department stated that the

Chapter 164 of the Acts of 1997, entitled "An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and other Services, and Promoting Enhanced Consumer Protection Therein" ("Restructuring Act" or "Act").

The other companies subject to investigation in D.T.E. 01-71 are Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company (D.T.E. 01-71A); Fitchburg Gas & Electric Light Company (D.T.E. 01-71C); and Western Massachusetts Electric Company (D.T.E. 01-71D).

investigation in D.T.E. 01-71B would focus on: (1) whether MECo met the service quality thresholds established by the Department in D.T.E. 99-84 beginning May 1, 2000; and (2) if not, what penalties should be imposed by the Department on the Company.<sup>3</sup> D.T.E. 01-71B at 2, Procedural Order at 2 (December 7, 2001).

Pursuant to notice duly issued, public hearings were held in the Company's service territory in Brockton, Worcester, Haverhill, and Gloucester on November 26, 27, 29, and December 20, 2001, respectively. The Attorney General of the Commonwealth of Massachusetts ("Attorney General") filed a notice of intervention as of right, pursuant to G.L. c. 12, § 11E, on November 19, 2001. The Commonwealth of Massachusetts Division of Energy Resources ("DOER") and the Utility Workers Union of America ("UWUA") were also permitted to intervene.

An evidentiary hearing was held on January 28, 2002. Robert H. McLaren, senior vice-president and treasurer of the distribution companies of National Grid USA, Mark Sorgman, manager of small business services for National Grid USA, and James D. Bouford, manager of distribution performance for National Grid USA Service Company, Inc. testified on behalf of the Company. The evidentiary record consists of

On August 24, 2001, the Department opened an investigation into MECo's examination of the underlying causes for the distribution system outages experienced during Summer 2001, a diagnosis of any operational or physical problems in the distribution system, and a plan to reduce, or where feasible, eliminate the risk of recurrence ("Self-Assessment Report"). Order Opening Investigation, D.T.E. 01-68. The Department has taken administrative notice in this present docket of the Company's October 29, 2001 Self-Assessment Report. D.T.E. 01-71B Procedural Order at 2, n.3 (December 7, 2001). At the request of the Attorney General, the Department also takes administrative notice, pursuant to 220 C.M.R. § 1.10(3), of all other documents filed in D.T.E. 01-68.

45 exhibits and responses to 18 record requests. MECo and the Attorney General filed initial briefs. MECo filed a reply brief.

### II. PROCEDURAL HISTORY

As part of the merger of MECo and Eastern Edison Company ("EECo"), the Department approved a rate plan settlement<sup>4</sup> on March 14, 2000 ("Rate Plan Settlement"). D.T.E. 99-47, at 74. The Rate Plan Settlement went into effect on May 1, 2000 and provides for a five-year distribution rate freeze, followed by a five-year period where MECo's distribution rates are capped at 90 percent of the average rates of other northeastern electric distribution companies. <u>Id.</u> at 4, 7-8. The Rate Plan Settlement contains service quality standards ("Original Plan") which penalize MECo for poor performance, but also allow it the opportunity to earn an incentive for above-average performance. <u>Id.</u> at 13. In the Order approving the Rate Plan Settlement, the Department stated:

[T]he Department approves the service quality plan proposed by the Petitioners with the condition or caveat that the Department's order in D.T.E. 99-84 may lead to wholesale replacement, or to significant modifications of some or all of the components of the Petitioners' plan. These changes might include, but are not limited to, changes in penalties, incentives, benchmarks, benchmarking method, monetary thresholds before penalties (or incentives) are collected from a company (or returned to it), and methods of distributing penalties or collecting incentives. Thus, the proposed service quality plan could be completely replaced, dependent upon the outcome of our generic service quality investigation.

D.T.E. 99-47, at 31-32.

The following were parties to the settlement with MECo: the Associated Industries of Massachusetts ("AIM"), the Attorney General, DOER, and the Energy Consortium ("TEC"). D.T.E. 99-47, at 2.

In June 2001, with the establishment of generic service quality guidelines in D.T.E. 99-84 ("Guidelines"), the electric distribution companies were directed to submit service quality plans consistent with the Guidelines by October 29, 2001. D.T.E. 99-84, at 42 (June 29, 2001). On October 29, 2001, MECo submitted a service quality plan settlement that differed from the D.T.E. 99-84 Guidelines ("Settlement Plan"). The Company was directed to supplement its October 29, 2001 filing with a service quality plan consistent with the Guidelines. D.T.E. 99-84, Letter to MECo (October 31, 2001). The Company filed a compliance service quality plan on November 2, 2001 ("Supplemental Filing").

On December 5, 2001, the Department declined to accept the Settlement Plan, finding that it was not similar in substance or in principle to the D.T.E. 99-84 service quality Guidelines. However, the Company was permitted to file additional support for its Settlement Plan in D.T.E. 01-71B. <u>Id.</u> D.T.E. 99-84, at 7, Letter Order (December 5, 2001).

With respect to the Company's Supplemental Filing, the Department found that, while it applied the Guidelines, there were some service quality measures and reporting requirements that were either not in strict compliance with the Guidelines or not consistent with the intent of the Guidelines. The Company was directed to file a revised service quality plan in strict compliance with the D.T.E. 99-84 Guidelines. <u>Id.</u>

A revised service quality plan was filed on December 10, 2001 and amended on December 13, 2001 ("Revised Compliance Plan"). The Revised Compliance Plan was

The parties to the Settlement Plan were the same as the parties to the Rate Plan Settlement in D.T.E. 99-47 (Exh. MEC-1, Att. 1, at 20-21; <u>see</u> n.3, above).

approved by the Department on December 17, 2001, subject to possible modification based on the outcome of D.T.E. 01-71B. D.T.E. 99-84, Letter Order (December 17, 2001). Rather than file additional support for its Settlement Plan, the Company filed an alternative service quality plan on December 14, 2001 ("Alternative Proposal") (Exh. MEC-1, Atts. 2, 4).

This Order determines the appropriate plan to measure the Company's service quality for the period beginning May 1, 2000 (the effective date of the Company's Rate Plan Settlement) through December 31, 2001, including an assessment of penalties where service quality thresholds have not been met. In addition, this Order addresses the Company's request to adopt an Alternative Proposal to measure its service quality for the year 2002 and beyond.

### III. SERVICE QUALITY PLANS

### A. <u>Introduction</u>

As a resolution of all issues in D.T.E. 01-71B, the Company proposes that its service quality be measured by the Original Plan in 2000, the Revised Compliance Plan in 2001 and the Alternative Proposal in 2002 and beyond (MECo Brief at 5-6). Each element of MECo's proposed resolution is described below. If the Department accepts this proposed resolution, the Company states that it will waive any rights it may have under the Rate Plan Settlement to seek exogenous cost recovery of any differences between the Original Plan and the Revised Compliance Plan (id. at 6).

### B. Original Plan

For the period May through December 2000, the Company proposes to apply the Original Plan approved by the Department in D.T.E. 99-47 (Exh. MEC-1, Att. 1, at 15). The

Original Plan provides for the evaluation of the Company's actual performance in the areas of reliability, line losses, customer service and safety through 2009 (id. at 4). For performance that is below average, the Company accrues penalties that are returned to ratepayers (Exhs. MEC-2, Att. 17, at 2; MEC-1, Att. 1, at 4). For performance that is above average, the Company accrues incentives that are collected from ratepayers (Exhs. MEC-2, Att. 17, at 2; MEC-1, Att. 1, at 4).

Net penalties or incentives are accumulated unless the accumulated amount exceeds a threshold cap of \$20 million; any amount over the \$20 million threshold will be returned to or collected from ratepayers in the following year (Exh. MEC-2, Att. 17, at 2; Tr. at 67).

Pursuant to the Rate Plan Settlement, the annual rate adjustments are to be collected through a uniform and fully reconciling surcharge or refund factor applied to all consumption billed under the Company's retail delivery rates (Exh. MEC-2, Att. 17, at 2). Any net penalty or incentive that remains at the end of the rate-index period in 2009 will be returned to or collected from ratepayers in a manner approved by the Department after a public hearing (Tr. at 67, 85; Supplement to Offer of Settlement, at 4 (February 25, 2000)).

The following service quality measures are included in the Original Plan: (1) outage frequency (System Average Interruption Frequency Index ("SAIFI")), (2) outage duration (System Average Interruption Duration Index ("SAIDI")), (3) distribution line loss, (4) customer satisfaction, (5) customer contact satisfaction, (6) customer telephone service, (7) customer billing service, (8) Department Consumer Division cases, (9) lost-work-time

accidents, and (10) restricted-work case rate (Exh. MEC-2, Att. 17, at 1-12).<sup>6</sup> Benchmarks for each measure are based on a five-year rolling average of performance (<u>id.</u> at 1). The standard deviation is fixed based on the initial five-year average of performance (<u>id.</u>).<sup>7</sup> The incentives and penalties calculated under each performance standard are set so that 25 percent of the maximum penalty or incentive is incurred at one standard deviation and an additional 75 percent of the maximum penalty or incentive is incurred at two standard deviations (<u>id.</u>). The maximum net penalty is capped at \$12 million for any one year (<u>id.</u> at 2). The maximum incentive for any one year is \$15 million (<u>id.</u> at 1-2).

Application of the Original Plan from May through December 2000 results in an incentive to the Company of \$3,506,000 (Exh. DTE 1-3R). The Company proposes to net any incentive earned in 2000 against any penalties assessed in 2001 (Exh. MEC-1, Att. 1, at 16; see § III.C, below).

### C. <u>Revised Compliance Plan</u>

For calendar-year 2001, MECo proposes to apply its Revised Compliance Plan, which is consistent with the Department's generic service quality Guidelines (Exh. MEC-1, Att. 1, at 16). Unlike the Original Plan, the Revised Compliance plan (1) does not provide for the payment of incentives; (2) does not include a service quality measure for distribution line losses; and (3) eliminates the \$20 million threshold before penalties are paid (id. at 13-14).

A major-event performance standard is also included in the Original Plan, but this standard does not become effective until 2003 (Exh. MEC-2, Att. 17, at 1).

The plan provides for a performance "floor" whereby any performance that equals or falls below the performance standard set for the initial period will result in the maximum penalty (Exh. MEC-2, Att. 17, at 1).

The Revised Compliance Plan provides performance measures for (1) customer telephone service; (2) service appointments met as scheduled; (3) on-cycle meter reads; (4) Department Consumer Division cases; (5) Department billing adjustments; (6) SAIDI; (7) SAIFI; and (8) lost-work-time accidents (Exh. MEC-2, Atts. 11, 13, at 4-8).8 The benchmarks for SAIDI and SAIFI are based on data from the most recent five years prior to the start of the plan, with benchmarks for other service quality measures based on as much of the most recent ten years' data as are available (id. at 4).

The Revised Compliance Plan includes penalty provisions. For each performance measure subject to a revenue penalty, both a performance benchmark using historic performance data and a maximum penalty level are established (<u>id.</u> at 8-10). If the Company's annual performance for a particular service quality measure falls within or is equal to one standard deviation from the performance benchmark, no penalty is imposed for that measure (<u>id.</u> at 8). If the Company's annual performance for a particular service quality measure exceeds one standard deviation from the performance benchmark, a penalty is imposed (<u>id.</u>). Penalties are calculated using a non-linear formula, up to the maximum penalty level for that performance measure (<u>id.</u> at 8-9).

The Revised Compliance Plan includes the following benchmark for staffing levels: "[s]taffing levels will be in accordance with the Guidelines set forth in G.L. c. 164, § 1E, and reviewed when the Company files its annual performance data" (Exh. MEC-2, Atts. 11, at 7; 13, at 7). At the direction of the Department, the Company submitted its staffing level data on March 1, 2002 (Exh. AG 1-11, Tr. at 54). While this timing requires that the Department consider staffing level benchmarks separate from this investigation, future consideration of staffing level benchmarks will take place in the context of the Company's filing of a performance-based ratemaking plan.

The Revised Compliance Plan also includes a penalty offset mechanism, whereby superior performance in a particular performance category may be applied as an offset against penalties imposed in other performance measures (id.). Penalty offsets may only be used to offset revenue penalties in the year they occur (id.). The maximum net yearly penalty under the Revised Compliance Plan is two percent of the Company's transmission and distribution revenues, and may be reduced by any service guarantee payments<sup>9</sup> made (id. at 8-10).

Finally, the Revised Compliance Plan includes annual reporting requirements for any performance measures that have a penalty attached to them, as well as the customer average interruption duration index ("CAIDI"), distribution line loss, restricted workday rate, damage to company property, annual major outage events, capital expenditure information, spare component and acquisition inventory policy and practices, poor performing circuits, transmission and distribution outages, and accident reporting as required by G.L. c. 164, § 95 (id. at 10-13).

Application of the Revised Compliance Plan results in a penalty to the Company of \$5,631,665 for calendar year 2001 (Exh. DTE 1-4R). The Company proposes to net the \$3,506,000 in incentives earned pursuant to the Original Plan in 2000 against the \$5,631,665 in penalties assessed pursuant to the Revised Compliance Plan in 2001, for a net penalty of \$2,125,665.

## D. <u>Alternative Proposal</u>

Service guarantee payments in the amount of \$25 are made to customers if the Company fails to keep service appointments or fails to send notification of planned service interruptions. D.T.E. 99-84, at 38 (June 29, 2001).

MECo proposes to apply its Alternative Proposal for the years 2002 through 2009 (Exh. MEC-1, cover letter at 4). The Alternative Proposal differs from the D.T.E. 99-84 Guidelines in five areas. First, the Alternative Proposal replaces the "revenue penalties and penalty offsets" structure of the D.T.E. 99-84 Guidelines with "revenue penalties and incentives." Under this proposal, the Company can potentially earn revenue incentives, rather than just penalty offsets if its annual performance is better than past performance (Exh. MEC-1, Atts. 2, 4, at 9). The award of incentives is conditioned upon the Company's average distribution rate remaining below the state-wide weighted average distribution rate (id.).

Second, unlike the D.T.E. 99-84 Guidelines, which use fixed performance measures, the Alternative Proposal uses a rolling average to update the historic benchmarks for each performance measure each year (Exh. MEC-1, Atts. 2, 4, at 4). However, the floor benchmarks that trigger penalties do not change (Exh. MEC-1, Att. 1, at 17).<sup>10</sup>

Third, the Alternative Proposal doubles the penalty provision for poor reliability if the penalty for SAIDI or SAIFI performance equals the maximum penalty for such measures for three consecutive years. If this occurs, the maximum penalty for the third year will be doubled and will remain doubled until performance improves (Exh. MEC-1, Atts. 2, 4, at 10).

Fourth, unlike the D.T.E. 99-84 Guidelines, under the Alternative Proposal the maximum penalty amount will not be reduced by any service guarantee payments

While this provision is part of the Company's prefiled testimony, it does not appear in the text of the Alternative Proposal (see Exh. MEC-1, Atts. 2, 4).

(Exh. MEC-1, Att-1, at 17-18).<sup>11</sup> Fifth, unlike the D.T.E. 99-84 Guidelines which expire in 2004, the Company offers the Alternative Proposal for effect January 1, 2002 through December 31, 2009. However, the Company states that the Alternative Plan is subject to a mid-period review and amendment by the Department in 2004 (Exh. MEC-1, Atts. 2, at 34; 4, at 72). The remainder of the Alternative Proposal is consistent with the service quality Guidelines in D.T.E. 99-84.

### IV. POSITIONS OF THE PARTIES

### A. <u>Original Plan</u>

In response to being notified that the Department may consider the application of its Revised Compliance Plan beginning May 1, 2000, 12 the Company argues that the Department should instead measure its service quality performance from May 1, 2000 through December 31, 2000 under the Original Plan (MECo Brief at 7). The Company argues that any attempt to apply the Revised Compliance Plan retroactively to 2000 is not allowed by law (id.). The Company states that a fundamental rule of ratemaking is that rates are prospective in nature (id. at 7-8). The Company argues that alteration of substantive rights is not warranted unless there is a showing of clear retroactive intent (id. at 8). While the Company contends that the Department's Order in D.T.E. 99-47 permits any modification of the Original Plan that is

Again, while this provision is part of the Company's prefiled testimony, it does not appear in the text of the Alternative Proposal (see Exh. MEC-1, Atts. 2, 4).

D.T.E. 01-71, at 1; D.T.E. 01-71B at 2, Procedural Order (December 7, 2001).

prospective in nature, the Company argues that D.T.E. 99-47 shows no clear intent to apply the Guidelines retroactively (id.).

Specifically, the Company argues that the Department's Order in D.T.E. 99-47 is not consistent with retroactive application for two reasons. First, in its discussion of exogenous factors, the Department stated "this proposed exogenous factor will remain in place only until the Department has developed a generic service quality plan and will continue to exist only if the Department approves a similar threshold" (MECo Brief at 9, citing D.T.E. 99-47, at 29). The Company contends that, if the Department had intended to apply the service quality Guidelines retroactively, the exogenous factor provision, including the Department's comment above, would have no meaning (id. at 10).

Second, the Company points out that, if the Department had contemplated retroactive application of the service quality Guidelines, it would have eliminated the Original Plan from the Rate Plan Settlement in its entirety and, instead, notified the Company that it would issue new standards at some point in the future and apply them retroactively to the Company's past conduct (id. at 9). MECo claims that, just as this action would be unreasonable at the time, it is not proper now (id.). Finally, the Attorney General supports the application of the Original Plan for 2000 (Attorney General Brief at 8-9).

### B. <u>Revised Compliance Plan</u>

Although the Company objects to the retroactive application of the Revised Compliance Plan in 2000, it states that it will accept its application in 2001 because the Department issued its service quality Guidelines during 2001 (MECo Brief at 9-10). The Company proposes to

net the incentives earned pursuant to the Original Plan in 2000 against the penalties assessed pursuant to the Revised Compliance Plan in 2001 (id. at 10).

In the event that the Department does not accept the Company's plan to net the 2000 incentives, the Company states that it may propose to apply a carrying charge on any residual balance remaining in the plan until 2009 (AG-RR-5). The Company opines that the carrying charge rate it would seek would likely be equal to the interest rate on customer deposits, which is the same rate used in the Company's various reconciliation mechanisms (currently 3.83 percent based on the average annual rate paid on two-year United States Treasury notes) (AG-RR-5; Tr. at 35; 220 C.M.R. § 26.09). The Attorney General supports the Company's use of the Revised Compliance Plan in 2001, but does not oppose the Company's application of any incentive it earned in 2000 to its penalty incurred in 2001 (Attorney General Brief at 9).

# C. <u>Alternative Proposal</u>

The Company argues that the Department should adopt its Alternative Proposal effective January 1, 2002, because it will provide "substantial benefits to customers" (MECo Brief at 10). The Company argues that because the Alternative Proposal increases the penalties for poor performance and adds incentives for improved performance, the Alternative Proposal creates "significantly more powerful incentives for enhanced service quality" than can otherwise be achieved within statutory constraints (id. at 10-12). Moreover, by providing an additional source of revenue, which MECo states may be critical at a time when its distribution

Applying this proposed carrying charge, the \$3,506,000 incentive balance for 2000 under the Original Plan would result in a balance of approximately \$4.7 million at the end of the rate index period in 2009.

rates are frozen, the Company argues that it will have an economic justification for the up-front costs required for many service quality improvements (id. at 12).

The Attorney General supports the adoption of the Alternative Proposal, arguing that it is consistent with the Original Plan in D.T.E. 99-47, the Department's Guidelines in D.T.E. 99-84, and G.L. c. 164, § 1E (Attorney General Brief at 7-8). The Attorney General argues that varying from the strict Guidelines of the Revised Compliance Plan will benefit the Company's ratepayers by providing an incentive to keep distribution rates less than the statewide weighted average distribution rate and by doubling penalties for poor performance if the maximum penalty is assessed for three or more consecutive years (id. at 9-10).

Although they did not participate actively in this proceeding, on December 21, 2001, DOER, AIM and TEC filed joint comments supporting the Alternative Proposal. DOER, AIM and TEC argue that the Department should adopt the Alternative Proposal because it is consistent with the terms of the Original Plan and any variations from the D.T.E. 99-84 Guidelines result in a plan that "provides more value to consumers" (Joint Comments at 2).

If the Alternative Proposal is approved as part of what the Company terms the "comprehensive resolution" (i.e., the application of the Original Plan for 2000, the Revised Compliance Plan for 2001, and the Alternative Proposal for 2002 through 2009), the Company has agreed to "waive its right to adjust its distribution rates based on a service quality exogenous factor" (MECo Brief at 13). If the Department does not approve the "comprehensive resolution," the Company states that it will seek exogenous cost recovery of the differences between the revenues that would have been collected or the penalties that would

have been imposed under the Original Plan and the penalties that would be due under the Revised Compliance Plan (AG-RR-2).

The Attorney General supports the adoption of the Alternative Proposal subject to Department review after 2004, arguing that it will provide "relative certainty" for the plan period (Attorney General Brief at 9). Acknowledging that, by its terms, the Department could substitute a different plan for the Alternative Plan after review, the Attorney General argues that ratepayers will still benefit from the Company's commitment not to seek recovery of the exogenous costs resulting from the future substitution of plans (id. citing AG-RR-3).

#### IV. ANALYSIS AND FINDINGS

The Department has encouraged all gas and electric distribution companies to file performance-based ratemaking ("PBR") plans. <u>Electric Industry Restructuring: A Model Plan</u>, D.T.E. 96-100, at 115-116 (1996); <u>Incentive Ratemaking</u>, D.P.U. 94-158, at 65-66 (1995). In fact, we have noted that we expect a PBR proposal will be part of each electric company's next base rate case submitted to the Department. <u>Electric Industry Restructuring</u>, D.T.E. 96-100, at 116. As noted in D.P.U. 94-158, a PBR plan must not result in reductions in safety, service reliability or existing standards of customer service. D.P.U. 94-158, at 59-60. To this end, the Department developed a set of generic service quality Guidelines in D.T.E. 99-84 for inclusion in the PBR plans to be submitted by electric distribution companies and local gas distribution companies pursuant to G.L. c. 164, § 1E.

Prior to adoption of the generic Guidelines in June 2001, MECo already had a service quality plan independent of a PBR plan, developed in the context of a merger rate plan. This

plan, the Original Plan, varies from the Guidelines established in D.T.E. 99-84. Therefore, as an initial matter, the Department must determine the appropriate plan or plans to measure the Company's service quality beginning May 1, 2000 through December 31, 2001.

When approving MECo's Original Plan in the context of its merger with EECo, the Department made provision to modify or replace the Company's Original Plan pending the outcome of D.T.E. 99-84. D.T.E. 99-47, at 31-32. Specifically, we stated that our Order in D.T.E. 99-84 may lead to "wholesale replacement, or to significant modification of some or all of the components of" the Original Plan. <u>Id.</u> As part of the present investigation, the Department stated that we would consider this directive as a basis for applying the Guidelines established in D.T.E. 99-84 to assess whether MECo has met service quality thresholds beginning May 1, 2000. D.T.E. 01-71, at 1; D.T.E. 01-71B at 2, Procedural Order (December 7, 2001). MECo contends, however, that this directive is not a clear expression of retroactive intent sufficient to permit the application of the Revised Compliance Plan to assess its service quality performance in 2000 (MECo Brief at 7-9).<sup>14</sup>

When considering the retroactive application of a statute, the general rule of interpretation is "that all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the preexisting state of the law and the effect

The Company does, however, propose to apply the Revised Compliance Plan to measure its service quality in 2001 (MECo Brief at 10).

upon existent rights, remedies and obligations." <u>Cambridge Electric Light Company</u>, D.T.E. 98-24, at 11 (1998), <u>citing Hein-Werner Corp. v. Jackson Industries, Inc.</u>, 364 Mass. 523, 525 (1974). The same rule of interpretation can be applied to Department Orders. In the present case, in order to apply the generic service quality Guidelines embodied in the Revised Compliance Plan to the Company's performance beginning in 2000, we must find that our Order in D.T.E. 99-47 necessarily implies that the application of the Guidelines

shall be retrospective.

As evidence of this intent, we consider the language cited above warning that the establishment of generic service quality Guidelines "may lead to wholesale replacement, or to significant modifications of some or all of the components of [the Original Plan]," and that the Original Plan "could be completely replaced, dependent upon the outcome of [D.T.E. 99-84]." D.T.E. 99-47, at 31-32. Although it is clear from this language that the Original Plan may be replaced or modified, our Order in D.T.E. 99-47 does not state with sufficient directness that such modification or replacement will be retrospective to the date of the MECo-EECo merger. <sup>15</sup>

In <u>BEC Energy/ComEnergy Acquisition</u>, D.T.E. 99-19 (2000), the Department approved a rate plan for NSTAR pursuant to G.L. c. 164. In that Order, the Department also approved a service quality plan for NSTAR, but noted that a generic proceeding (<u>i.e.</u>, D.T.E. 99-84) would be opened to investigate issues relating to service quality. <u>Id.</u> at 106-107. The service quality plan approved by the Department in D.T.E. 99-19 did not include a penalty mechanism. <u>Id.</u> However, the Department directed the Company to file a proposal for a penalty mechanism within six months of the date of the merger. <u>Id.</u> at 7. At NSTAR's request, the Department deferred any decision concerning the penalty mechanism pending the completion of the Department's generic investigation in D.T.E. 99-84. NSTAR does not contest the Department's directive to calculate penalties from September 1, 1999 through August 31, 2001, and averred that it would calculate the penalty amount in accordance with the mechanism (continued...)

Absent an expression of clear intent, we find that any modification or replacement of the Original Plan must be prospective. As a result, we are unable to replace the Original Plan with the Revised Compliance Plan to measure the Company's service quality in 2000. <sup>16</sup> Instead, MECo's service quality from May 1, 2000 through December 31, 2000 must be measured pursuant to the Original Plan.

The Department has reviewed the Company's performance from May through December 2000 under the Original Plan. Out of ten performance measures subject to a revenue penalty, the Company failed to meet its performance goals for two measures during this period, i.e., distribution line loss and restricted work case rate, and exceeded its performance goals for the other eight performance measures, particularly those relating to customer service (Exhs. MECo-1, Att. 9, at 9-10, Att. 10, at 8; DTE 1-3R, Att. 1). We find that the Company has properly applied the performance standards contained in its Original Plan to its actual performance for 2000. Therefore, pursuant to the Original Plan, we find that MECo's actual performance from May through December 2000 results in an incentive to the Company of \$3,506,000 (Exh. DTE 1-3R).

If retrospective application of the Revised Compliance plan is impermissible in 2000, it is likewise impermissible in 2001. The D.T.E. 99-84 service quality Guidelines were issued on

<sup>(...</sup>continued) delineated by the Department in D.T.E. 99-84. D.T.E. 01-71A at 2, n.2.

Because the Original Plan took effect in May of 2000, the Company prorated the revenue penalties and incentives accrued during that year so that only 8/12 of the total year was used to calculate the overall incentive (Exh. MECo-1, Att. 1, at 5; DTE 1-3R).

June 29, 2001, and the Company's Revised Compliance Plan embodying the service quality Guidelines was approved on December 17, 2001. D.T.E. 99-84 (June 29, 2001); D.T.E. 99-84, Letter Order (December 17, 2001). Therefore, application of the Guidelines to measure the Company's service quality in 2001 would also be retrospective. Instead, we find that MECo's service quality from January 1, 2001 through December 31, 2001 must also be measured pursuant to the Original Plan.

The Department has reviewed the Company's performance during 2001 under its Original Plan. Out of ten performance measures subject to a revenue penalty, the Company failed to meet its performance goals for nine of these measures, of which the Company incurred the maximum penalty level for six measures; i.e., SAIDI, lost time accident rate, telephone response, customer satisfaction, Consumer Division cases, and on-cycle meter readings (Exh. DTE 1-4R, Att. 1). These penalties were partially offset by the Company's improvement during 2001 in distribution line loss, which earned the maximum incentive (id.). The Department finds that the Company has properly applied the performance standards contained in its Original Plan to its actual performance for 2001. Application of the Original Plan during 2001 results in the assessment of a penalty in the amount of \$9,280,000 (id.).

The Original Plan contains a \$20 million threshold that must be exceeded before incentives are collected from or penalties are returned to ratepayers (Exh. MEC-2, Att. 17). Therefore, under the Original Plan, the \$3,506,000 in accumulated incentives earned by the Company in 2000 are reduced by the \$9,280,000 in penalties incurred in 2001, resulting in an accumulated net penalty of \$5,774,000 (Exhs. DTE 1-3R; DTE 1-4R). Although this amount

remains below the \$20 million threshold, the Rate Plan Settlement provides that any residual accumulated penalty or incentive remaining at the end of the plan is to be "returned to or recovered from customers in a manner approved by the Department" (Supplement to Rate Plan Settlement at 4 (February 25, 2000)). As that end date has been accelerated and the Original Plan is terminating, we find that it is appropriate and consistent with our replacement of the Rate Plan Settlement, and with the Settlement itself, for the Company to cash out the accumulated net penalties as of the end of 2001.

The Company has proposed, consistent with its Rate Plan Settlement, to refund the net penalties to customers through a uniform and fully reconciling refund factor applied to all kilowatt hours billed under the Company's retail delivery rates (Supplement to Rate Plan Settlement at 4 (February 25, 2000)). We find that the Company's proposed use of a uniform and fully reconciling refund factor to return net penalties to ratepayers is reasonable and consistent with the Rate Plan Settlement and therefore approve the proposal. Within five days of the date of this Order, the Company shall file appropriate schedules showing the refund of \$5,774,000 in net penalties to ratepayers over a one-month period, including all supporting workpapers, calculations and assumptions.

Although we have found that we cannot replace the Original Plan retrospectively, we are able to replace it prospectively. Therefore, we must determine the appropriate plan to measure MECo's service quality beginning January 1, 2002. Instead of applying the Revised Compliance Plan, the Company urges the Department to apply its Alternative Proposal to

measure its prospective service quality (MECo Brief at 10). Recognizing that the Company might have legitimate but unpersuasively expressed reasons for departing from the D.T.E. 99-84 service quality Guidelines, the Department permitted MECo to present additional support for its Alternative Proposal in this proceeding. D.T.E. 99-84, at 7, Letter Order (December 17, 2001).

Although the Alternative Proposal is similar in substance to the Revised Compliance Plan, it still contains several significant differences, most notably the ability of the Company to be financially rewarded through incentives for maintaining or exceeding minimum service quality standards. Regarding the propriety of incentive structures, we have previously expressed concern that symmetrical penalty/reward structures may fall outside the scope of the service quality performance mechanisms authorized by G.L. c. 164, § 1(E). D.T.E. 99-84, at 28, n.26 (June 29, 2001). Yet, MECo is already subject to a merger-related service quality plan containing penalty/reward structures. This Original Plan exists independent of a PBR plan and the requirements of G.L. c. 164, § 1(E). The Department's direction in D.T.E. 99-47, at 31-32, the Original Plan is subject to wholesale replacement or significant modification as a result of our investigation in D.T.E. 99-84. However, until the Company is operating under a PBR plan, we are guided, but not bound, by the requirements of G.L. c. 164, § 1E when

While they do not have PBRs in place, MECo, NSTAR, and Bay State Gas Company are currently subject to service quality penalties resulting from their merger-related service quality plans. <u>See Bay State Gas/NIPSCo</u>, D.T.E. 98-31 (1998); D.T.E. 99-19 (1999); D.T.E. 99-47 (2000).

weighing an appropriate merger-related service quality plan. <sup>18</sup> Therefore, we can consider whether MECo's Alternative Proposal offers benefits to ratepayers that outweigh the value of uniform service quality Guidelines for all utilities. <sup>19</sup>

As a clear benefit to ratepayers, the Alternative Proposal toughens the penalties for poor service quality. Unlike the Guidelines, penalties for poor reliability are doubled in the event that maximum service quality penalties are incurred for three or more consecutive years. In addition, the maximum penalty amount is not reduced by any service guarantee payments made.

The ability of the Company to earn revenue incentives is also a potential benefit to ratepayers. To earn an incentive, the Company's average distribution rates must be below the state-wide average distribution rate and performance benchmarks must be exceeded. Historical benchmarks for each performance measure are updated every year, making it harder to earn incentives, but the original trigger level for penalties remains the same. By allowing it the opportunity to recover some of its costs, the Alternative Proposal should encourage the Company to make investments designed to improve its service quality over time.

When determining the appropriate service quality measures to apply in D.T.E. 99-84, the Department was guided by the requirements of G.L. c. 164, § 1E in areas such as employee staffing level benchmarks and maximum penalty levels. It is anticipated that all service quality plans applying the Guidelines will eventually be part of PBR plans authorized pursuant G.L. c. 164, § 1E. Indeed, developing service quality measures is a necessary preliminary to drawing up a PBR. Therefore, it was reasonable to incorporate § 1E's integral service quality standards within the Guidelines.

In D.T.E. 99-84, we stated that uniform guidelines promote administrative efficiency as well as allow the Department to evaluate each company's performance in comparison with the other utilities. D.T.E. 99-84, at 4, Letter Order (December 17, 2001).

We have noted our concern that, if not properly designed, symmetrical reward/penalty structures may create incentives for utilities to incur significant expenses in areas that, while producing marginal service quality benefits, could ultimately be detrimental to other operations. D.T.E. 99-84, at 45-46 (August 17, 2000). Only actual experience will tell if this concern is justified. Absent this experience, the Alternative Proposal's overall level of reward from incentives for good service quality appears reasonable in light of the Company's exposure to increased risk from larger penalties for poor service quality.

In light of the fact that the Company's merger-related service quality plan contained penalty/reward structures, and in consideration of the potential benefits to ratepayers discussed above, <sup>20</sup> we find that the Company has provided sufficient justification to deviate from the D.T.E. 99-84 service quality Guidelines for its merger rate plan. Beginning January 1, 2002, MECo shall measure its service quality and incentives or penalties pursuant to the Alternative Proposal. However, in order to preserve a consistent framework to evaluate each company's

As an additional benefit to ratepayers, the Company agrees to waive any rights it might arguably have to exogenous cost recovery if we accept the Alternative Proposal. In our decision to allow the Alternative Proposal we do not, however, give this "benefit" much weight. With respect to the recovery of exogenous costs, the Rate Plan Settlement in D.T.E. 99-47 provides that if "the revised standard [pursuant to the outcome of D.T.E. 99-84] would result in a significant difference in the balance of risks, costs and benefits set forth in [the Original Plan], the quantified differences shall be recognized as an exogenous cost. . ." (Rate Plan Settlement at 26-27; Exh. MEC-1, Att. 1, at 6-7). The Company is free to make such a filing, and the merits of that filing will be determined after review. That G.L. c. 164, § 1E predated the Original Plan and was well-known when that Plan was filed is a fact, however, that would need to be reckoned with in arguing that applying the Guidelines developed under that statute is "exogenous" in any recognized sense of that term.

performance in comparison with the other utilities, MECo shall also be required to report annually its service quality performance in accordance with the D.T.E. 99-84 Guidelines.

Like the Original Plan, the Department approves the Alternative Proposal with condition or caveat that it may be modified or replaced after review in 2004, or in conjunction with the adoption of a PBR plan pursuant to G.L. c. 164, § 1E. In addition, we note that the approval of the Alternative Proposal in no way limits ability of the Department to investigate, where appropriate, the quality or price of electricity delivered by the Company pursuant to G.L. c. 164, § 93.

Finally, we address the Attorney General's request that the Department order an independent review of the Company's service quality data. The Attorney General argues that an independent review is necessary to ensure that the historical statistics used for comparison are accurate and compiled in a manner consistent with the Department's Guidelines (Attorney General Brief at 10-11). In the alternative, the Attorney General moves that the Department reopen the evidentiary record to permit him to question the Company's witnesses regarding updated responses to information requests (id. at 10). We do not find that an independent review of the Company's service quality data is necessary. Such review may prove to be costly and it is not clear that it would provide benefits to ratepayers commensurate with its cost. Also, any updated responses to information requests arose solely in the context of the Company's responses to record requests and, therefore, are properly part of the evidentiary record in this proceeding (id. at 7).

The Company is aware of its records-keeping requirement under G.L. c. 164, §§ 76 and 80 et seq. and under 220 C.M.R. § 75.00. Moreover, the penal provisions of G.L. c. 268, § 6, concerning false entries in required business records have been recently drawn to the attention of the general counsels of all electric companies (Outage Reporting Protocol Letter dated August 24, 2001). No indicia of records-keeping unreliability are evident on the record, and none has been advanced by the Attorney General. Little, if anything, could be gained by the suggested approach. The review is vested by statute in these proceedings and has been conducted. The Company will pay its penalty and focus on the actions it must take to improve future service in Summer 2002 and beyond. That is where the Company's focus and energies should be -- not on a reiterated review of what has already been examined. Therefore, the Attorney General's motion to reopen the evidentiary record is denied.

### V. <u>ORDER</u>

Accordingly after due notice, hearing and consideration, it is

ORDERED: That for the periods May through December 2000, and January through December 2001, the Company shall apply the Original Plan approved by the Department in D.T.E. 99-47 to measure its service quality; and it is

<u>FURTHER ORDERED</u>: That the Company shall refund, over a one month period, a net penalty of \$5,774,000 to its customers through a uniform and fully reconciling refund factor applied to all kilowatt hours billed under the Company's retail delivery rates; and it is

<u>FURTHER ORDERED</u>: That within five days of the date of this Order, the Company shall file appropriate schedules showing the refund of \$5,774,000 in net penalties to its customers; and it is

<u>FURTHER ORDERED</u>: That for the period beginning January 1, 2002, the Company shall apply the Alternative Proposal to measure its service quality; and it is

<u>FURTHER ORDERED</u>: That the Attorney General's motion to reopen the evidentiary record is <u>DENIED</u>; and it is

FURTHER ORDERED: That the Company shall comply with all other directives contained in this Order.

By Order of the Department,
James Connelly, Chairman
W. Robert Keating, Commissioner
Paul B. Vasington, Commissioner
Eugene J. Sullivan, Jr. Commissioner
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).